IN THE

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 110.

THE CINCINNATI STREET RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

CHARLES B. SNELL, DEFENDANT IN ERROR.

Additional Brief for Plaintiff in Error on Question of Jurisdiction.

In determining whether the judgment is final or not, within the meaning and scope of the court's appellate jurisdiction, we should not lose sight of the fact that the only question presented by the proceedings in error in Ohio and decided thereunder by the courts of that State was whether the Street Railway Company had a right to have the suit pending against it tried in the county of its residence. That question was decided in its favor by the court of first instance. That right was affirmed by the court of second instance. That

right was denied it by the court of last resort. That question can never be tried again in Ohio. It is settled forever against the Street Railway Company, so far as the courts of that State are concerned. A judgment of this court in this proceeding would settle the question forever, no matter whether the judgment were one of affirmance or of reversal. If it were one of affirmance, the Street Railway Company was not entitled to and could not have its case tried in the county of its residence. If it were one of reversal, then the Street Railway Company was entitled to have its cause tried there, and no error occurred in trying it there. It follows that, the question being once determined here, it can never be brought back to this court, no matter how it may be determined here, and no matter how the case might be determined later in the Ohio court, if the result were to require it to be tried over again. There is no Federal question in the cause, except as to the validity or invalidity of the statute giving the right of change of venue, and consequently one determination here of that question would settle it forever.

The judgment of the supreme court of Ohio was not simply a judgment of reversal and remanding the case for further proceedings according to law, but it was a special judgment "that the cause be remanded to the court of common pleas, *with direction to grant the change of venue*" (R., 11). This part of the judgment places this subject beyond the control of the inferior tribunal and disposes effectually of so much of the controversy as determines the right of the plaintiff in error to the protection of the provision of the Federal Constitution which we invoke. In the language of Mr. Justice Gray, in

Telegraph Co. *vs.* Burnham, 162 U. S., at page 342, the inferior court "was directed to enter a judgment rendered by the Supreme Court and carry it into execution." It is therefore a final judgment of the Supreme Court as to the Federal question involved in the case.

The provision of the judgment is an inseparable part of the judgment of the supreme court as an entirety. If it is affirmed by this court it will finally dispose of the case, so far as this court is concerned. If it is reversed and the case remanded to the supreme court of Ohio for further proceedings they will necessarily be such only as are consistent with the determination of the Federal question by this court; and as no other error was complained of or found in the record by the supreme court of Ohio than that involving the validity of section 5033 of the Revised Statutes of Ohio, the judgment on the verdict in favor of the plaintiff in error will be preserved to it. In no other way can the substantial right of the plaintiff in error be conserved.

The question is, perhaps, analogous to that presented in the circuit court of appeals for the first circuit, in the case of *Potter vs. Deal*, reported in 50 Federal Reporter, 860. In that case the circuit court had made an order that its master should take possession and make private examination of the books and papers of the plaintiff, and to deliver certain of them to the plaintiff and certain of them to the defendant. The appellate court found that this order clearly violated the constitutional and fundamental rights of the litigant, and the court held that in so far as this order denied to the litigant the protection of the Constitution, it was final, and necessarily so to be regarded, from which an appeal

might be taken before any other decree disposing of the issues generally in the case.

One purpose, if not the primary purpose, of limiting the appellate jurisdiction of this court to re-examine, reverse, or affirm "a *final* judgment or decree" of the highest court of a State (U. S. Rev. Stat., sec. 709) was to relieve this court of the necessity and burden of hearing and determining repeated appeals or proceedings in error in the same cause. It is entirely consistent with this purpose to treat the present judgment as final, within the meaning of this court's appellate jurisdiction; for, as already shown, the cause can never be brought back to this court for retrial upon the only question which the supreme court of Ohio has decided and the only question which is presented here for decision, to wit, the validity or invalidity of Ohio Revised Statutes, section 5033, under the fourteenth amendment. In other language, the litigation between the parties on that subject will be ended by the judgment rendered here, no matter whether it be a judgment of affirmance or a judgment of reversal. This seems to us to be all that is required to establish finality, within the true meaning and intendment of the numerous decisions of this court. We think it a fair observation to be made of the decisions that this court has given liberal construction to the act defining its appellate jurisdiction in this regard wherever it would subserve the purpose of the act by settling the controversies so far as they involved Federal questions (McGourkey *vs.* Toledo & Ohio R. R., 146 U. S., 536, at 546 *et seq.*).

Another test, and we submit the controlling test of finality, is by inquiring whether there is any method of conserving

the Street Railway Company's present obvious right to the judgment rendered in the common pleas court upon the verdict in its favor, except by determining here and now the validity or invalidity of section 5033 under the fourteenth amendment. We feel safe in saying that the benefit of that judgment would be lost to the Street Railway Company if this court were now to decline jurisdiction. The judgment of the supreme court of Ohio was rendered at its January term, 1899 (60 O. S., 256). That judgment reversed the judgment upon the verdict in the court below (*ibid.*, at 273). Now, if we were sent back to the court of first instance to try the case under the order "to grant the change of venue," and then after suffering judgment and bringing the case through the courts of Ohio to this court again for a decision as to the validity of section 5033, we know of no way by which the judgment of reversal rendered, as aforesaid, by the supreme court of Ohio at its January term, 1899, could be changed so as to restore to us the judgment upon the verdict which it destroyed. The term of the supreme court at which this was done has already passed into history. There is no statute in Ohio which furnishes a mode for opening up a judgment rendered under such circumstances after so long a lapse of time—indeed, after the expiration of the term. Even the rule of the court would be against us upon an application for a rehearing. Rule XX of that court provides:

"Such application (for a rehearing) must be made at the term at which the decision is rendered and within thirty days of the announcement of the decision."

We could not ask to have the judgment restored by an entry *nunc pro tunc;* for there was nothing done or omitted

to be done during that term in respect of that judgment otherwise than as expressly intended (The Bayonne, 159 U.S., 687, at 692, 693). It therefore is inevitable that the only way in which the Street Railway Company can be protected in its rights under the verdict and judgment thereon in question is to determine now whether those rights are being sought to be destroyed by an unconstitutional statute under the fourteenth amendment. Mr. Justice Blatchford, in Keystone Iron Co. *vs.* Martin, 132 U. S., 91, at 94, quoted with approval language of Mr. Chief Justice Taney, which clearly implies that injury to a plaintiff in error by refusing jurisdiction is a subject for consideration. The language is:

"The appellant is not injured by denying him an appeal in this stage of the proceedings," etc.

Respectfully submitted.

E. W. KITTREDGE,
J. W. WARRINGTON,
Counsel for Plaintiff in Error.

NOVEMBER 17, 1900.